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No. 00-10666

In The

# Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

## BRIEF OF 25 STATES AND TERRITORIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## STATEMENT OF *AMICI* INTEREST

*Amicus curiae* State of New Jersey, together with 24 other States and Territories, writes in support of respondent to affirm the judgment below. At issue is the continued vitality of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which for 16 years has stood for the rule that the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment permit state legislatures to require courts to impose a mandatory term of imprisonment, within a prescribed statutory range, when the judge finds a particular aggravating fact to exist under an evidentiary standard less than "beyond a reasonable doubt." Petitioner seeks to abolish the *McMillan* rule by requiring a jury finding beyond a reasonable doubt on the existence of the legislatively-defined aggravating circumstance.

The doctrine of *stare decisis* precludes reversal of *McMillan*. Many States, including New Jersey, have implemented mandatory minimum statutes in their respective criminal codes, and will be immediately affected by any modification or wholesale retraction of the *McMillan* rule. Those States that at present do not utilize such statutes will nonetheless feel the impact of any revision to this long-standing rule if, at some future date, changing penological demands call for mandatory minimum sentencing schemes.

The States' reliance on a viable and workable constitutional rule, and the enormous burden that the States will be forced to bear if this rule is suddenly invalidated, call for the reaffirmance of *McMillan*. For these reasons and those elaborated below, we submit this *amici curiae* brief for the Court's consideration.

## SUMMARY OF ARGUMENT

For sixteen years, *McMillan* has enabled state legislatures to deal with dangerous criminals by enacting statutes requiring the imposition of mandatory minimum terms of imprisonment, within the statutory range for the offense, when the sentencing judge finds the existence of a prescribed "sentencing factor" under an evidentiary standard lower than "beyond a reasonable doubt." Principles of *stare decisis* operate against nullifying the *McMillan* rule. *McMillan* is still good law that need not and should not be overruled.

First, nothing in the Court's more recent jurisprudence invalidates *McMillan*. Petitioner's attempt to superimpose the "bright line" rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than recidivism, which increases a sentence beyond the statutory maximum must be presented to a jury, onto mandatory minimum sentencing statutes, is defeated by the *Apprendi* Court's firm pronouncement that "sentencing enhancers" are fundamentally different from "sentencing factors."

Second, the multi-prong *McMillan* test remains entirely workable. It was last utilized by this Court less than two years ago in *Apprendi*. Petitioner himself analyzes the federal statute at issue using the *McMillan* test.

Third, many state legislatures have relied upon the *McMillan* "sentencing factor" rule since the case was decided. Countless state prisoners will be subject to early release if *McMillan* is overruled. Ironically, these prisoners are precisely the ones that legislatures, in enacting mandatory minimum terms, have deemed most deserving of parole ineligibility terms.

Fourth, policy and practicality dictate retention of the *McMillan* rule. Shifting sentencing responsibility away from the judge will increase the likelihood that juries will acquit a



defendant of the criminal charges, rather than impose a stiff mandatory minimum. It will prejudice criminal defendants by requiring them to pursue mutually-exclusive strategies as they seek to maintain their innocence while at the same time seek to mitigate their punishment. It will drive up the cost of jury trials which were once unitary but may now need to be bifurcated. And it will impose an undue burden on jurors who must put aside other responsibilities to sit through a second phase of trial, often weeks after the guilt phase ended.

Finally, if this Court is inclined to overrule *McMillan*, any new rule must be given prospective application only, in order to forestall the flood of petitions for collateral relief that will inevitably ensue.

In the end, there is no sound justification for invalidating the *McMillan* rule. The *amici* States and Territories urge its reaffirmance.

## ARGUMENT

### THE CONSTITUTIONAL RULE OF *McMILLAN* REMAINS GOOD LAW, AND PRINCIPLES OF *STARE DECISIS* PRECLUDE THIS COURT FROM OVERRULING ITS VALID PRECEDENT.

Petitioner sets forth alternative arguments for vacating his mandatory minimum term of seven years imposed pursuant to 18 U.S.C.A. § 924(c)(1)(A)(ii) (West 2000), following the sentencing court's finding that petitioner "brandished" a firearm during the course of his drug trafficking crime. His fallback position is to ask this Court to overrule the 1986 decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which endorsed mandatory minimum sentences imposed when a judge finds the presence of an aggravating sentencing factor prescribed by the legislature. Petitioner claims the holding of *McMillan* is no longer viable in light of the more recent rule of *Apprendi* 530 U.S. 466 (2000), that any fact, other than

recidivism, which increases a sentence beyond the statutory maximum must be presented to a jury. *McMillan* is still good law, however, and principles of *stare decisis* preclude this Court from abrogating its precedential value.

The Court traditionally approaches reconsideration of its own decisions "with utmost caution." *State Oil Company v. Khan*, 522 U.S. 3, 20 (1997). Whether or not this Court would today agree with the precept of *McMillan*, "the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). The policy of *stare decisis* favors adherence to precedent and "promotes stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991); *accord United States v. International Business Machines Corporation*, 517 U.S. 843, 856 (1996). "[E]ven in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Petitioner fails to offer the requisite "special justification"to abandon the long-standing precedent of *McMillan*, because the *Apprendi* rule does not at all weaken the validity of this decision. *See United States v. Gaudin*, 515 U.S. 506, 521 (1995).

From the time it was decided in 1986, *McMillan* has permitted state legislatures to enact statutes requiring sentencing courts to impose mandatory minimum terms upon finding specific aggravating sentencing factors under an evidentiary standard less than "beyond a reasonable doubt." The *Apprendi* majority acknowledged "the likelihood that legislative decisions may have been made in reliance on *McMillan*," and saved "for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding." *Apprendi*, 530 U.S. at 486 n.13. If that



day has arrived, this Court should reaffirm *McMillan*, because it is still good law.

**A. The New "Bright Line" Rule Announced by the *Apprendi* Court Casts No Doubt on the Continued Validity of *McMillan*.**

Relying on *Jones v. United States*, 526 U.S. 227, 239 (1999), petitioner's primary argument in support of reversal of the Fourth Circuit opinion below is one of statutory construction. (Pet. Brief at 8-26). Petitioner contends, when read correctly, the text of § 924(c)(1)(A)(ii) makes "brandishing" an element of the predicate crime of violence or drug trafficking to be determined by a jury under the "beyond a reasonable doubt" standard, and not a separate sentencing factor which, when found by the judge, triggers the imposition of a mandatory minimum term of seven years.

*Jones* examined the enhanced penalties available under the grading sections of the federal carjacking statute, 18 U.S.C.A. § 2119 (West 2000), if the offense resulted in serious bodily injury or death. Employing a textual analysis, the Court construed § 2119 as establishing three separate offenses by the specification of distinct elements. *Jones*, 526 U.S. at 262. In the case presently before this Court, petitioner claims that the structure of the brandishing statute, § 924(c)(1)(A)(ii), is "indistinguishable from that in *Jones*," and requires a similar outcome based on principles of statutory construction. (Pet. brief at 6).

Alternatively, petitioner contends, the United States Constitution requires that a finding of brandishing a firearm in the furtherance of any crime of violence or drug trafficking under § 924(c)(1)(A)(ii) must be treated as an element of the offense. To reach this latter option, petitioner asks this Court to take the drastic step of overruling *McMillan* by extending the narrow holding of *Apprendi* to all mandatory minimum term statutes. (Pet. Brief at 27-45). The development of

related principles of law, including the *Apprendi* rule, however, has not rendered the *McMillan* rule obsolete. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992).

Over one-half century ago, the Court found that the United States Constitution was not offended when the New York State Legislature conferred broad discretionary powers on sentencing courts in fixing individualized punishments for convicted offenders. *Williams v. New York*, 337 U.S. 241, 249-52 (1949). Examining the historical basis for different evidentiary rules governing trial and sentencing procedures, the *Williams* Court noted that sentencing courts have for centuries possessed considerable discretion in setting appropriate terms of incarceration within prescribed statutory ranges:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

*Williams*, 337 U.S. at 246.

"Sound practical reasons" further justified different evidentiary rules governing trial and sentencing procedures. *Ibid.* The guilt phase of a criminal trial deals with evidence "that is strictly relevant to the particular offense charged." *Id.* at 247. Consequently, evidence related to sentencing



should be excluded at the guilt phase, so as not to improperly influence the trier of fact. *Ibid.* The sentencing court, in contrast, "is not confined to the narrow issue of guilt" but is concerned solely with the appropriate type and length of punishment after the question of guilt has been determined. *Ibid.*

Almost forty years after *Williams*, the *McMillan* Court concluded that it was constitutional for state legislatures to designate which aggravating factors found by the sentencing court required the imposition of mandatory parole ineligibility periods. The result in *McMillan* depended in part on the Court's appreciation of and adherence to *Williams*. Citing to *Williams*, the *McMillan* court noted, "Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91.

At issue in *McMillan* was a provision of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.Const.Stat. § 9712 (West 1982), authorizing judges to sentence anyone convicted of certain enumerated felonies to no less than five years imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. *McMillan*, 477 U.S. at 80-82. Rebuffing the petitioners' contention that visible possession of a firearm was an element of the offense that had to be proven beyond a reasonable doubt, the Court noted that the legislature's definition of the elements of the offense is usually dispositive in distinguishing between essential elements of an offense and mere sentencing factors. *Id.* at 85.

The *McMillan* Court scrutinized the Pennsylvania statute using multiple criteria to determine the constitutionality of imposing a mandatory minimum sentence based on a finding of a fact not proven beyond a reasonable doubt. *Id.* at 87-88. The Court found that the Act created no presumptions of

guilt, nor did it relieve the prosecution of its burden of proving guilt and only became applicable after a defendant was duly convicted of the crime for which he is to be punished. *Id.* at 87. A defendant sentenced pursuant to the Act did not face "'a differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *Ibid.* (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975)). The statute did not alter the maximum penalty for the crime committed but operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. *McMillan*, 477 U.S. at 87-88. Nor was a separate offense calling for a separate penalty created. *Id.* at 88.

Finally, the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Ibid.*; *see also Almendarez-Torres v. United States*, 523 U.S. 224, 242-43 (1998). The Pennsylvania Legislature "did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -- the instrumentality used in committing a violent felony -- and dictated the precise weight to be given that factor if the instrumentality is a firearm." *McMillan*, 477 U.S. at 89-90. All that *McMillan* added to the *Williams* doctrine was to allow legislatures to limit the sentencing court's discretion by specifying those aggravating factors which require the imposition of a minimum penalty within a statutorily-prescribed range.

A very different type of sentencing statute was challenged in *Apprendi*. New Jersey's Hate Crime Statute, N.J.Stat.Ann. § 2C:44-3e (West 1995), at the time required the sentencing judge to *extend* a defendant's maximum term of imprisonment for the predicate offense if the judge determined, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of



race, color, gender, handicap, religion, sexual orientation or ethnicity." *Apprendi*, 530 U.S. at 468-49. This statutory scheme was found unconstitutional, because it deprived the petitioner of a jury finding beyond a reasonable doubt of facts which exposed him to a penalty greater than the statutory maximum for the offense charged in the indictment. *Id.* at 490. The *Apprendi* Court articulated this "bright line" rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Ibid.*

The *Apprendi* Court expressly restricted the reach of its new rule by drawing a crucial distinction between a "sentencing enhancement," which requires a jury finding beyond a reasonable doubt, and a "sentencing factor" which does not:

> The term [sentencing factor] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

*Apprendi*, 530 U.S. at 494 n.19 (emphasis in original). The Court expressly declined to apply this new "bright line" rule to mandatory minimum sentencing terms. *Apprendi*, 530 U.S. at 487 n.13.

Tracing the development of criminal sentencing in this country, the *Apprendi* Court made perfectly clear "that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481 (emphasis in original). *Williams* was specifically cited twice in support of this proposition. *Id.* at 481, 482. The *Apprendi* decision gives no hint, let alone declares, that *McMillan*, which recognized that a sentencing judge's discretion could be reined in by the legislature, is constitutionally unsound. To the contrary, the *Apprendi* majority noted that its reasoning did not conflict with *McMillan's* narrow holding, because the statute in *McMillan* did not increase the overall maximum term. *Apprendi*, 530 U.S. at 495.

The *Apprendi* decision does not change or erode the fundamental principal of *McMillan*. In fact, *Apprendi* upholds and respects its validity. *Apprendi* stands for nothing more than what it plainly says: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The *Apprendi* majority expressly declined to extend this very narrow holding to mandatory minimum sentencing terms, explaining in no uncertain terms, "We do not overrule *McMillan*." *Apprendi*, 530 U.S. at 487 n.13.



The rule of *McMillan* is not an "abandoned doctrine," *Casey*, 505 U.S. at 855, that can, or should, be abrogated.[1]

**B. The *McMillan* Rule Remains Entirely Workable.**

Certainly, the multi-faceted test formulated in *McMillan* has not proven "unworkable." *See Casey*, 505 U.S. at 855. The *Apprendi* court in fact used it to show why New Jersey's Hate Crime sentencing enhancement statute, which increased the petitioner's sentence beyond the prescribed statutory range for the predicate offense, did *not* pass constitutional muster under *McMillan*. *Apprendi*, 503 U.S. at 495-96. The *McMillan* test was also employed by the Court two years earlier to find that the Constitution permits a legislature to authorize the judge to impose an enhanced sentence based on the traditional sentencing factor of recidivisim. *Almendarez-Torres*, 523 U.S. at 242-24. And, most telling of all, in arguing that Congress restructured existing crimes in order to evade the commands of *In re Winship*, 397 U.S. 358 (1970), thereby relieving the prosecution of its burden of proving guilt, petitioner himself subjects § 924(c)(1)(A) to the *McMillan* test. (Pet. Brief at 45-47).

**C. The States' Reliance on the *McMillan* Rule Demands its Reaffirmance.**

The *McMillan* rule "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,"

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[1] That *McMillan* was decided by a narrow 5-4 split ought not undermine its authority. It has continued to be good law for the past sixteen years. *Apprendi*, 530 U.S. at 487 n.13. And, to the extent that the narrow 5-4 majority in *McMillan* gives any indication that its precedential value rests on shaky ground, it should not be overruled by the recent *Apprendi* decision, which itself was decided by a slim 5-4 majority only two terms ago.

*Casey*, 505 U.S. at 854, because many states have reasonably relied on *McMillan*'s continued application. *See id.* at 855. The consequences of abrogating long-standing precedent guiding state legislatures "will likely be severe." *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). If this Court holds that every fact relevant to the determination of a mandatory minimum sentence must be decided by a jury, by proof beyond a reasonable doubt, "its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades." *Id.* at 549.

Mandatory minimum sentencing laws are the product of a movement towards determinate sentencing that decreases disparate punishment. They are "designed to control the discretion of judges and parole boards and advance the goals of deterrence and incapacitation." Wayne R. LaFave, Jerold H. Israel & Nancy J. King, 5 Criminal Procedure, at 735 § 26.3(c) (2d ed. 1999). By February 1996, all 50 states and the District of Columbia employed some version of mandatory minimum sentencing laws where the triggering factor is found either by the judge or the jury. Most of these laws target habitual offenders and the crimes of possessing a deadly weapon, driving under the influence of alcohol, and possessing and/or distributing drugs. Monograph, U.S. Department of Justice, *1996 National Survey of State Sentencing Structures* (1998, NCJ 169270), Exhibits 1-1, 1-4. "Truth in sentencing" laws requiring violent offenders to serve 50% to 100% of the maximum sentence imposed prior to release have also become common throughout the United States. By 1999, 42 states had adopted such laws. Paula M. Ditton & Doris James Wilson, U.S. Department of Justice,



*Truth in Sentencing in State Prisons* (1999, NCJ 170032), Table 1.[2]

At least five states and one territory authorize the judge to impose mandatory minimum terms following a judicial finding, by a preponderance of the evidence, that the defendant possessed a firearm. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vanderbilt L.Rev. 1467, 1492 (2001); *see, e.g.*, Alabama: Ala. Code § 13A-5-6(a)(4), (5) (1994); *Ex parte Guess*, 507 So.2d 551 (Ala. 1987); Kansas: Kan.Stat.Ann. § 21-4618 (West 2000) (applies to crimes committed prior to July 1, 1993); *State v. McCarty*, 224 Kan. 179, 578 P.2d 274 (1978); Minnesota: Minn.Stat.Ann. § 609.11 (West 1987 and Supp. 2002); New Jersey: N.J.Stat.Ann. § 2C:43-6c, d (West 1995); Pennsylvania: 42 Pa.Const.Stat. § 9712(a), (b) (West 1998); *McMillan*, 477 U.S. at 81-82; United States Virgin Islands: Virgin Islands Gun Control Act of 2001, 2001 V.I. Sess.Laws 6493.

Other examples of mandatory minimum sentencing statutes where the triggering factor is found by the judge and is not necessarily encompassed in a jury verdict are in effect in Alaska [Alaska Stat. § 12.55.125(b) (Michie 2000) (relationship of child-murder victim to defendant)]; Arizona [Ariz.Rev.Stat. § 13-604.02(B) (2001) (release status); *State v. Cox*, 37 P.3d 437 (Ct.App. Ariz. 2002)], Colorado

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[2] States that enact sentencing laws requiring that all persons convicted of "part 1 violent crimes" serve not less than 85% of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior) are eligible for federal grant awards under the Violent Offender Incarceration and Truth-in-Sentencing programs (VOITIS). 42 U.S.C. § 13704(a)(1) (West 1995 and Supp. 2001) ("Truth-in-sentencing incentive grants"). "Part 1 violent crimes" are defined as "murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault, as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports." 42 U.S.C. § 13701(2) (West 1995 and Supp. 2001) ("Definitions").

[Colo.Rev.Stat.Ann. § 18-1-105(9) (West 1986 and Supp. 1996) ("extraordinary aggravating circumstances")], Florida [Fla.Stat.Ann. § 775.082(9)(a)(1) (West 2000 and Supp. 2002) (Prison Releasee Reoffender Act); *McGregor v. State*, 789 So.2d 976 (Fla. 2001)], Illinois [730 Ill.Comp.Stat.Ann. 5/5-5-3(c)(2)(D) (West 1998) (quantity of drugs); *People v. Phillips*, 759 N.E.2d 946 (Ill. App. 2001); 730 Ill.Comp.Stat.Ann. 5/3-6-3(a)(2)(iii) (West 1998) (victim suffered great bodily harm); *People v. Fender*, 757 N.E.2d 645 (Ill. App. 2001)], Kansas [Kan.Stat.Ann. § 21-4635 (West 2000) ("hard 40" for first degree murder); *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied*, 121 S.Ct.1383 (2001)], Maryland [Md.Ann.Code of 1957, Art. 27, § 286 (1996 and Supp. 2001) (repeat drug offender); *Gardner v. State*, 344 Md. 642, 689 A.2d 610 (1997); Md.Ann.Code of 1957, Art. 27, § 286D (1996 and Supp. 2001) (repeat drug offender in school zone); Md.Ann.Code of 1957, Art. 27, § 643B (1996 and Supp. 2001) (second conviction of crime of violence); *Taylor v. State*, 333 Md. 229, 634 A.2d 1322 (1994)], Missouri [Mo.Rev.Stat. § 558.018.5 (West 2000) (predatory sexual offender)] and Pennsylvania [18 Pa.Const.Stat. § 6314(a) (West 2000) (delivery of controlled substance to a minor); 18 Pa.Const.Stat. § 6314(b) (West 2000) (four specified circumstances present during delivery of controlled substance); 18 Pa.Const.Stat. § 6317(b) (West 2000) (delivery of controlled substance within specified distance of school property, playground or on a school bus); 18 Pa.Const.Stat. § 7508(a) (West 2000) (nature and quality of controlled substance delivered or intended for delivery); 42 Pa.Const.Stat. § 9713(a) (West 1998) (specified offense committed in or near public transportation); 42 Pa.Const.Stat. § 9717(a) (West 1998) (victim is over 60 years of age and not a police officer); 42 Pa.Const.Stat. § 9718(a) (West 1998) (victim is either under 16 years of age or 13 years of age); 42 Pa.Const.Stat. § 9719(a) (West 1998) (offense committed by person impersonating a law enforcement officer); 75



Pa.Const.Stat. § 3742(b) (West 1996) (leaving scene of accident involving serious bodily injury or death)].

Appellate courts in several states have taken the *Apprendi* Court at its word when it advised, 530 U.S. at 487 n.13, "We do not overrule *McMillan*." These courts have expressly found their respective mandatory minimum sentencing statutes constitutional under *Apprendi*. *See McGregor v. State*, 789 So.2d at 977-78 (Supreme Court of Florida upheld Fla.Stat.Ann. § 775.082(9)(a)(1), requiring the imposition of a mandatory minimum equal to 100% of maximum term imposed when the sentencing court finds the defendant committed or attempted to commit any of the enumerated crimes within three years of being released from a state correctional facility); *State v. Conley*, 270 Kan. at 30-35, 11 P.3d at 1157-1160 (Supreme Court of Kansas upheld "hard 40" mandatory minimum sentence, Kan.Stat.Ann. § 21-4635, imposed when the sentencing court finds, under the "preponderance of the evidence" standard, certain aggravating factors warranting an increase of the parole ineligibility period for first-degree premeditated murder from 25 to 40 years); *State v. Cox*, 37 P.3d at ___ (Court of Appeals of Arizona upheld Ariz.Rev.Stat. § 13-604.02(B), which permits the sentencing court to increase the mandatory minimum term based on a finding by clear and convincing evidence of the defendant's release status); *People v. Phillips*, 759 N.E.2d at 949-50 (Court of Appeals of Illinois upheld 730 Ill.Comp.Stat.Ann. 5/5-5-3(c)(2)(D), authorizing sentencing courts to impose a four-year mandatory minimum sentence upon finding that the quantity of cocaine in the defendant's possession with intent to deliver was in excess of five grams); *People v. Newbolds*, 757 N.E.2d 664, 665-66 (Ill. App.) (Court of Appeals of Illinois upheld 730 Ill.Comp.Stat.Ann. 5/3-6-3(a)(2)(iii), requiring a defendant to serve 85% of his term of imprisonment when sentencing court makes a finding that the victim suffered great bodily harm), *appeal denied*, ___ N.E.2d ___ (2001); *People v. Fender*, 757 N.E.2d at 652-54 (same). "These states should

not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence must now be treated as offense elements for determination by the jury." *Jones*, 526 U.S. at 271 (Kennedy, J., dissenting).

Several of New Jersey's mandatory minimum sentences have likewise been challenged under *Apprendi*. Unlike other state courts, however, the New Jersey judiciary has acted in anticipation that *McMillan* may be overruled. In *State v. Johnson*, 166 N.J. 523, 547, 766 A.2d 1126, 1140 (2001), the Supreme Court of New Jersey construed the 1997 "No Early Release Act" (NERA), N.J.Stat.Ann. § 2C:43-7.2 (West 1995 and Supp. 2002), to require a jury finding beyond a reasonable doubt that the defendant committed a "violent" crime before a mandatory parole ineligibility period equal to 85% of the maximum term could be imposed. Acknowledging, as it had to, that the *Apprendi* decision specifically declined to overrule *McMillan*, the Supreme Court of New Jersey applied the state's "constitutional doubt" doctrine and interpreted the text of NERA so as to avoid the constitutional question. *Johnson*, 166 N.J. at 540-41, 543-44, 766 A.2d at 1136, 1138.

Consistent with the statutory analysis employed in *Johnson*, the Superior Court of New Jersey, Appellate Division, has interpreted two different mandatory minimum sentencing statutes to require jury findings beyond a reasonable doubt of the predicate fact triggering mandatory minimum sentencing. *State v. Petrucci*, 343 N.J. Super. 536, 779 A.2d 429 (App. Div. 2001) (under assault firearms statute, N.J.Stat.Ann. § 2C:43-6g (West 1995), jury must determine whether a particular firearm is "substantially identical" to an enumerated firearm or type of firearm), *petition for certif. pending*; __, N.J. __, __ A.2d __ (2002); *State v. Stanton*, 339 N.J. Super. 1, 770 A.2d 1198 (App. Div.) (under vehicular homicide statute, N.J.Stat.Ann. § 2C:11-5b(1) (West 1995 and Supp. 2001), jury must determine whether the defendant was driving under the



influence of alcohol or drugs at the time of the offense), *certif. granted*, 169 N.J. 609, 782 A.2d 427 (2001).[3] In a third case, *State v. Watson*, 2002 WL58914, at *8 (N.J. App. Div. January 16, 2002), the appellate court sidestepped the constitutional issue, but advised trial judges in future cases to submit to the jury the question whether under the firearm possession statute, N.J.Stat.Ann. § 2C:43-6c, the defendant used or possessed a firearm. *Cf. Malloy v. State*, 1 P.3d 1266, 1280-88 (Alaska Ct. App. 2000) (appellate court held that Alaska Stat. § 12.55.125(a)(3) (Michie 2000), which increases the mandatory minimum term for first degree murder from 20 to 99 years and restricts the defendant's eligibility for discretionary parole when "the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture," denied defendant her rights to due process, jury trial and grand jury indictment under the Alaska State Constitution), *pet. hr'g granted* (Alaska 2000). There is, therefore, much at stake in New Jersey, as well as every other state with mandatory minimum sentencing statutes.

That not all jurisdictions have designated the sentencing judge as the finder of facts triggering mandatory minimums does not lessen the enormous impact of overruling *McMillan*. "[T]he fact that the States have formulated different statutory schemes to punish [criminals] is merely a reflection of our federal system, which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.'" *McMillan*, 477 U.S. at 90 (quoting *Spencer v. Texas*, 385 U.S. 554, 566 (1967)). Legislatures that have chosen particular models of sentencing for dealing with their prison populations should be free to modify or abandon them

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[3] The Supreme Court of New Jersey during oral argument in *State v. Stanton* on January 3, 2002, indicated its intention to await this Court's decision in *Harris* before assessing the constitutionality of the mandatory minimum sentencing provision in the vehicular homicide statute, N.J.Stat.Ann. § 2C:11-5b(1), under *McMillan*.

when they no longer fit the penological needs of their state. *See* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St.Louis U.L.J. 425, 427 (2000) (noting that two states, Louisiana and Wisconsin, repealed their respective sentencing guidelines). States that at the moment do not entrust the imposition of mandatory minimums to the judiciary may find in the future that vesting sentencing judges with this responsibility better suits their demands for sentencing reform. Overruling *McMillan* will thus affect every state, not only those which presently authorize judges to impose mandatory minimum sentences when specified aggravating circumstances are found.

The *Apprendi* decision has generated a tidal wave of litigation: as of February 2002, Westmate™ lists close to 2,700 state and federal cases citing to *Apprendi*. There is no reason to believe that overruling *McMillan* will have any less impact on state courts. Indeed, the predictable fallout from reversal of *McMillan* cannot be overstated. It will create an avalanche of post-conviction applications in the state courts, as well as habeas corpus petitions in the federal courts, by state prisoners sentenced under laws which at the time were deemed constitutional. New Jersey's Graves Act, N.J.Stat.Ann. § 2C:43-6c, for example, requires the sentencing court to fix a mandatory term of one-third to one-half the maximum sentence imposed for the underlying offense if the judge finds, by a preponderance of the evidence, the person was in possession of a firearm "while in the course of committing or attempting to commit the crime, including the immediate flight therefrom ...." N.J.Stat.Ann. § 2C:43-6d. This law was enacted in 1981. 1981 N.J. Laws c.31, § 1, eff. February 12, 1981. More than twenty years have since passed, and thousands of New Jersey state prisoners will inundate the state and federal court dockets demanding early release if *McMillan* is overruled. All of these prisoners possessed a firearm while committing their



crimes, making them among the state's most violent offenders.[4]

### D. Sound Reasons of Policy and Practicality Favor Retention of the Historical Demarcation Between Jury and Judicial Functions.

"The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Blurring this dividing line comes at great practical and monetary cost to the criminal justice system.

In the unitary trial format, an increase in jury nullification is a natural consequence of informing jurors of mandatory penalties in the course of the trial. "[T]here is evidence" that jurors who are aware of mandatory minimum terms "choose to nullify rather than condemn a guilty defendant to such a severe sentence." Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1784 (1999). The breakdown of the separate functions traditionally delegated to judges and juries thus puts the prosecution at a distinct disadvantage: even when the state is able to prove a sentencing factor beyond a reasonable doubt, the jury, unlike the judge, has the power to disregard the law and acquit, without any recourse for the prosecution under double jeopardy principles. This will also complicate jury selection, because potential jurors who are unable or unwilling to

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[4] We have been informed by Stanley Repko, Director, Office of Policy and Planning, New Jersey Department of Corrections, as of January 2002, of the 27,400 inmates housed in New Jersey state prisons, 16,714 (approximately 60%) were serving fixed periods of parole ineligiblity. This figure, however, does not distinguish between mandatory and discretionary parole disqualifiers.

consider guilt separately from punishment must be weeded out.

Reallocating sentencing decisions to the jury will surely clog the trial court system in states with mandatory minimum sentencing statutes. Even defendants who plead guilty to the substantive offense could demand that a jury make the determination whether a mandatory minimum sentencing factor applies. And, when the accused believes that the prosecution cannot meet its burden of proving a particular triggering factor beyond a reasonable doubt, he has a strong incentive to reject any plea offer that includes a mandatory minimum sentence and instead take his chances at a jury trial.

"There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury." *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting). Indictments and jury instructions will become more cumbersome than they are now. Asking a jury to consider "every conceivable wrinkle" will become "unworkable and seriously compromise the certainty of punishment and its deterrent effect." *Ibid.* (quoting United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987), Part A, at 1.2).

Criminal defendants, too, will bear substantial setbacks, as they try to avoid conviction by maintaining their innocense, while they simultaneously attempt to mitigate their sentence if convicted. *Almendarez-Torres*, 523 U.S. at 235; *Monge v. California*, 524 U.S. 721, 729 (1998). Often, the strategies of seeking an outright acquittal and seeking a lenient sentence are at complete odds with each other. "Requiring defendants to confront aggravating factors at trial burdens their right not to testify and not to present evidence. At the same time, the rules of evidence tie their hands in presenting mitigating evidence." Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors*



*into Offense Elements: The Apprendi Debate*, Federal Sentencing Reporter, Vol. 12, No. 4 (January/February 2000). It will be difficult, if not impossible, at such trials to craft comprehensible instructions completely eradicating the prejudice to the accused when evidence is admitted on the issue of punishment but cannot be considered by the jury on the issue of guilt. *Cf. Shannon*, 512 U.S. at 579 ("providing jurors sentencing information ... creates a strong possibility of confusion.").

Bifurcated trials in which the jury first considers guilt and then considers punishment in separate proceedings will inevitably follow when the sentencing factor is not an essential element of the predicate offense, but this is an ineffective solution. "Bifurcating fact-finding at trial will not resolve the inherent tension between strategies aimed at securing acquittal and those that tacitly acknowledge some guilt in the hope of mitigating punishment." Ross, *supra* at ___.

Bifurcation is also costly and impractical. The finder of fact at sentencing hearings must have reliable evidence of aggravating and mitigating sentencing factors. Jurors who sat at the guilt phase thus may have to be recalled weeks or months later when the presentence or probation investigation is finally completed. Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355, 1377 (1999) (book review); *see, e.g.*, N.J.Stat.Ann. § 2C:44-6a (West 1995 and Supp. 2001) ("The court shall not impose sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation when required by the Rules of Court."); N.J. Court Rule 3:21-2(a) ("Before the imposition of a sentence or the granting of probation court support staff shall make a presentence investigation in accordance with [N.J.Stat.Ann.] § 44-6 and shall report to the court. The report shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant and the

prosecutor."). This puts an undue hardship on jurors who have already fulfilled their civic duty, yet once again must set aside their obligations to their families and jobs to assume what historically has been strictly a judicial function. Impaneling an entirely new group of jurors at the sentencing phase eliminates the strategic problems involved in recalling guilt-phase jurors, but it, too, is a time-consuming and costly measure.

There also exists the very real risk that the public will be endangered by requiring all mandatory minimum terms be found by a jury beyond a reasonable doubt. As noted above, juries reluctant to impose a mandatory term may opt instead for acquittal. In other cases where the prosecution is unable to meet the high burden of proof beyond a reasonable doubt, but can meet a lower evidentiary standard, mandatory minimum terms cannot be imposed. The result is that the most threatening criminals whom state legislatures have designated as least deserving of early parole (such as those in possession of a firearm during the commission of the offense) will, under a reallocation of sentencing facts, be more likely to be sentenced without the mandatory parole ineligibility periods that keep them in prison and safely away from the general public.[5]

### E. Any Modification in the *McMillan* Rule Should Be Given Prospective Application Only.

Should this Court choose to extend *Apprendi* to require that the triggering factor for mandatory minimum terms must be found by a jury beyond a reasonable doubt, the *amici*

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[5] Requiring sentencing facts to be found under the "beyond a reasonable doubt" standard also conflicts with the Court's precedent that sentencing courts may consider uncharged or acquitted conduct in fixing appropriate sentences within statutory guidelines. *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).



States and Territories strongly urge this Court to make plain that this rule, which would place a new obligation on the states and federal government, is prospective only. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). Retroactive application will lead to an administrative crisis for the state court systems which will be overrun with petitions for collateral relief.

The courts of New Jersey realize the overwhelming burden the state will bear if a similar rule is applied retroactively. In *Johnson*, 166 N.J. at 547, 766 A.2d at 1140, the Supreme Court of New Jersey construed the 1997 "No Early Release Act" (NERA), N.J.Stat.Ann. § 2C:43-7.2, to require a jury finding beyond a reasonable doubt that the defendant committed a "violent" crime before a parole ineligibility period equal to 85% of the maximum term could be imposed. Until *Johnson*, the sentencing courts had made that finding under a lesser evidentiary standard. Noting that "[r]etroactive application of today's ruling could result in post-conviction petitions from a large number of inmates currently serving NERA sentences[,]" the Supreme Court of New Jersey deliberately made its ruling prospective only. *Johnson*, 166 N.J. at 547, 766 A.2d at 1140. Similarly, in *Watson*, 2002 WL58914, at *8, the Superior Court of New Jersey, Appellate Division, stopped short of striking down the firearms possession statute, N.J.Stat.Ann. § 2C:43-6c, d, as unconstitutional, but urged trial judges *in future cases* to submit special verdicts to the jury in Graves Act cases where the use or possession of a firearm is not an element of the predicate offense. The state courts are rightfully worried about the application of a new rule based on an extension of *Apprendi* "when such an application would undermine the

validity of a large number of convictions." *Johnson,* 166 N.J. at 547, 766 A.2d at 1140.[6]

This Court should note that the states' legislative reaction to overruling *McMillan* will likely be similar to the New Jersey Legislature's response to the *Johnson* decision by the Supreme Court of New Jersey. NERA, as originally enacted, imposed a mandatory minimum prison term of 85% of the overall sentence for any first- or second degree conviction found by the sentencing judge to be a "violent crime." N.J.Stat.Ann. § 2C:43-7.2a, c. NERA defined "violent crime" as

> [a]ny crime in which the actor causes death, causes serious bodily injury as defined in subsection b. of N.J.S. 11-1, or uses or threatens the immediate use of a deadly weapon. "Violent crime" also includes any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force.

Thus, for example, under the original NERA statute, a person armed with a firearm during the course of a robbery would

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[6] Federal circuit courts of appeal in every circuit have refused to apply *Apprendi* retroactively, and no conflict exists on this issue: *See Sustache-Rivera v. United States*, 221 F.3d 8, 14-15 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 1364 (2001); *Forbes v. United States*, 262 F.3d 143,145-46 (2d Cir. 2001); *In re Turner*, 267 F.3d 225, 227-30 (3d Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir.), *cert. denied*, 122 S.Ct. 573 (2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *In re Clemmons*, 259 F.3d 489, 493 (6th Cir. 2001); *Talbott v. Indiana*, 226 F.3d 866, 868-70(7th Cir. 2000); *Rodgers v. United States*, 229 F.3d 704, 706 (8th Cir.2000); *Jones v. Smith*, 231 F.3d 1227, 1236-38 (9th Cir. 2000); *Browning v. United States*, 241 F.3d 1262, 1266 (10th Cir. 2001); *In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000).



not be subject to the 85% parole ineligibility term unless he in fact used or threatened the use of that firearm. *Johnson*, 166 N.J. at 545-46, 766 A.2d at 1139. As noted, the Supreme Court of New Jersey construed NERA as requiring the jury, not the judge, to determine whether the crime was violent.

The New Jersey Legislature's response to the *Johnson* decision was to rewrite NERA so that enumerated first- and second degree offenses are NERA crimes subject to 85% mandatory minimum sentencing, without regard to whether the actor actually caused death or serious bodily injury, whether the crime actually involved the use or threatened use of a deadly weapon, or whether during any aggravated sexual assault or sexual assault the actor actually used, or threatened the immediate use of, physical force. N.J.Stat.Ann. § 2C:43-7.2 (1997 N.J. Laws c. 117, § 2, eff. June 9, 1997, amended by 2001 N.J. Laws c. 129, § 1, eff. June 29, 2001). The sentencing courts' discretion under NERA is now limited solely to the maximum sentence imposed, within prescribed statutory guidelines. It is convicted criminals who thus stand to lose when sentencing courts are no longer authorized to make individualized findings regarding the suitability of mandatory minimum terms.

In sum, this Court should continue to "reject[] the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the state must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (quoting *Patterson v. New York*, 432 U.S. 197, 214 (1977)). The *McMillan* rule is both viable and workable, and has been relied upon by the States to imprison countless criminal defendants. As a matter of practice, repudiation of the *McMillan* rule will prejudice the defense, hamper the prosecution, and unduly tax jurors. It will also cause a flood of collateral petitions for relief in the state and federal courts. *McMillan* is still good law, and the doctrine of *stare decisis* weighs heavily against its reversal.

## CONCLUSION

The *amici* States and Territories respectfully urge the Court to affirm the judgment below.

Respectfully submitted,

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